

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1378 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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PATEL AMRUTLAL MANHARDAS

Versus

PATEL BHIKHABHAI GORDHANDAS

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Appearance:

MR DD VYAS for Petitioner.

MR VC DESAI for Respondents.

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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 04/11/96

ORAL JUDGEMENT

Rule. Mr.V.C.Desai, Ld.Advocate waives service of notice of the Rule on behalf of the respondents. In the facts and circumstances of the case, and by the consent of the learned Advocates appearing for the parties, the CRA is taken up for final hearing today and the same shall stand disposed of by this judgment and order.

2. The petitioner who is the original defendant in Regular Civil Suit No. 77 of 1994 of the Court of the learned Civil Judge (JD), Vijapur has filed the present

Civil Revision Application under S.115 of the Code of Civil Procedure, challenging the judgment and order dated 12.8.1996, passed by the learned 2nd Extra Assistant Judge, Mehsana, in Civil Misc. Appeal No. 116 of 1995, whereby the learned 2nd Extra Assistant Judge, by allowing the appeal, granted ad-interim injunction against the defendant and in favour of the respondents -plaintiffs by ordering the petitioner-defendant not to interfere or disturb the way which is situated on the western side of Survey No.749 to go to Survey No. 750 and 750/1 till final disposal of the suit.

3. The plaintiffs who are the owners of Survey No. 750/1 and 750/2 of Village Malosan, Taluka Vijapur, filed RCS No. 77 of 1994 in the court of the learned Civil Judge (JD), Vijapur for declaration that they have got right of way from the northern side of Survey No.749 belonging to the defendant to reach Survey No. 1069 which was gaucher land so that by passing that gaucher land, they can reach Malosan-Gavada approach road. It was alleged by the plaintiffs that the defendant had amalgamated his Survey No. 749 and Survey No. 755, and had converted the same into non-agricultural use, and was carrying out construction for commercial purpose, and by that act, the defendant was restraining the plaintiffs from passing through the disputed land Survey No. 749, which was their right of way to go to Malosan-Gavada approach road. By filing application Ex.5, the plaintiffs also prayed for ad-interim injunction pending hearing and final disposal of the suit by restraining the defendant from interfering or disturbing the right of way of the plaintiffs through Survey No.749.

4. The learned Civil Judge (JD), Vijapur who heard and decided the application Ex.5 filed by the plaintiffs, by his order dated 13.7.1995, rejected the application for ad-interim injunction. The plaintiffs filed Civil Misc. Application No. 116 of 1995 in the District Court at Mehsana. After filing of the appeal, the plaintiffs filed an application in the lower appellate court, on 9.11.1995, for amendment of the plaint. However, the said application for amendment of the plaint was not pressed by the learned Advocate for the plaintiffs, and on the same day, i.e. on 9.11.1995, the plaintiffs who were the appellants before the lower appellate court, filed application Ex.15 for production of additional evidence under Or.41 Rule 27 read with S.151 of the Code. The said application was kept for hearing and order to that effect was passed by the learned District Judge on 9.11.1995. The petitioner-defendant had filed his objection against the application for production of

additional evidence. The learned District Judge, passed the following order on the said application:

" Heard. Production is allowed.

sd/-

District Judge, Mehsana.

31.1.1996 "

5. After the additional evidence was permitted to be produced on record, the learned 2nd Extra Assistant Judge, Mehsana, allowed the appeal by granting ad-interim injunction restraining the petitioner-defendant not to interfere or disturb the way which is situated on the western side of Survey No. 749 to go to Survey No. 750 and 750/1, till the final disposal of the suit, which has given rise to the filing of the present Civil Revision Application.

6. Learned Counsel for the petitioner Mr.D.D.Vyas has submitted that the lower appellate court has committed illegality and material irregularity in the exercise of its jurisdiction at the time of hearing of the appeal, by allowing additional evidence to be produced, without recording reasons. The learned Counsel further pleaded that the lower appellate court had not considered the documents and affidavits filed by the petitioner-defendant and had allowed the appeal. It is further argued that there was variance in the pleadings in the plaint as compared to the application for ad-interim injunction Ex.5. It is further pleaded that the original plaintiffs who were the appellants before the lower appellate court, with a view to fill in the lacunae, had rectified the documents and produced the rectification as additional evidence in the lower appellate court, which was relied on by the lower appellate court in deciding the appeal, and granting ad-interim injunction against the petitioner.

7. As against the above contentions, learned Counsel for the Respondents Mr.V.C.Desai has argued that as per the decision of the Supreme Court in the case of K.VENKATARAMAIAH vs. SEETHARAMA REDDY & ORS., AIR 1963 SC p.1526, it was not incumbent upon the court to record reasons for allowing additional evidence. It is further argued by the learned Counsel for the Respondents that in mofussil when the pleadings are over, the same should be read as a whole so that the genuine claim cannot be defeated on trivial grounds. The learned Counsel for the respondents also pleaded that the lower appellate court had also not considered the affidavits filed by the

plaintiffs with list Ex.24 at marks 24/1 to 24/10.

8. The lower appellate court has allowed the production of additional evidence on 3.1.1996, and the same was considered at the hearing of the appeal. The learned Counsel for both the sides have conceded before this court that the lower appellate court had not considered the documentary evidence produced by the defendants with list Ex.95 at Marks 95/1 to 95/14, 95/16, 96/17 and 95/18 as well as the affidavits filed by the plaintiffs with list Ex.24. It is also conceded by the learned Counsel that the lower appellate court had not considered the two panchnamas of the disputed property which are produced at Marks 6/2 and 52/3.

9. If the judgment and order of the lower appellate court is read minutely, it becomes abundantly clear that it has not taken into consideration the documents produced by both the sides in the trial court. The lower appellate court has only considered the rectification documents produced as additional evidence at the appellate stage. In deciding the appeal, the lower appellate court has lost sight of the fact that it has to consider the relevant documents to find out whether the plaintiffs have got any right of way over the suit survey no.749. The lower appellate court has not considered the agreement mark 95/17 in its proper perspective because it did not mention the survey no.755, even though the lower appellate court has, in its judgment, in para 14 observed that there was some agreement with respect of Survey No.750 and 755. Both the learned Counsel have conceded that the lower appellate court has not considered the documents and other evidence produced by the plaintiffs as well as the defendant, during the hearing of the appeal. Therefore, the learned Counsel for the respective parties have requested this court to remand the matter for fresh decision of the lower appellate court, to arrive at the just and proper conclusion whether the plaintiffs have any prima facie case with regard to the right of way over Survey No.749. The learned Counsel for the petitioner has submitted that by remanding the matter to the lower appellate court, the petitioner-defendant will get the opportunity to meet with the additional evidence, which was allowed by the lower appellate court.

10. It was the bounden duty of the lower appellate court to consider all the documents and affidavits produced by the respective parties in deciding the appeal, and come to the conclusion whether the plaintiffs have got prima facie case with regard to their right of

way over disputed Survey No. 749. The material documents produced by the respective parties were not at all considered in their proper perspective by the lower appellate court. The impugned judgment and order of the learned Extra Assistant Judge, is therefore, required to be interfered with in this Civil Revision Application, because the learned lower appellate Judge has exercised the jurisdiction with illegality and material irregularity, and thus the case falls within Clause (b) of S.115 of the Code of Civil Procedure.

11. As a result of the foregoing discussion, this CRA is allowed. The judgment and order dated 12.8.1996 passed by the learned 2nd Extra Assistant Judge, Mehsana, in Civil Misc. Appeal No. 116 of 1995 is hereby quashed and set aside. Civil Misc. Appeal No. 116 of 1995 is remanded to the lower appellate court with a direction to decide the same afresh by giving opportunity of hearing to both the sides. The lower appellate court is directed to take into consideration the documents and affidavits filed by the respective parties during the trial. It is clarified that by remand of the appeal to the lower appellate court, the defendant will get an opportunity to meet with the additional evidence which was allowed at the appellate stage by the learned District Judge. The lower appellate court is directed to dispose of the appeal as expeditiously as possible, and in any event before 31.1.1997. During the pendency of the appeal before the lower appellate court, the parties are directed to maintain status quo as regards the suit property. Office is directed to return the Record and proceedings of Civil Misc. Appeal No. 116 of 1995 and Regular Civil Suit No. 77 of 1994 to the District Court, Mehsana, at the earliest despatch, alongwith the writ of this order. Rule is made absolute accordingly with no order as to costs.

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Abraham.